United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2543

P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT L. CARDILLO, Plaintiff-Appellant,	:	
-against-	:	Docket No. 74-2543
DOUBLEDAY & COMPANY, INC., THOMAS C. RENNER, VINCENT TERESA, and FAWCETT PUBLICATIONS, INC., d/b/a TRUE MAGAZINE, Defendants-Appellees.	:	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLANT ROBERT L. CARDILLO

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BRIEF OF PLAINTIFF-APPELLANT ROBERT L. CARDILLO

THE ISSUE PRESENTED

Plaintiff Robert L. Cardillo ("plaintiff") submits this brief in support of his appeal from a decision of the Honorable Murray Gurfein, then a District Court Judge in the Southern District of New York, dismissing his pro se complaint as a matter of summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Judge Gurfein's

order was entered on November 16, 1973 (38*). Plaintiff is appealing in forma pauperis with assigned counsel (39).

The issue presented on this appeal is whether the Court should remand the case to the District Court for further proceedings in light of Gertz v. Welch, 41 L.Ed.2d 789 (1974), which rejected the test for liability used by the District Court.

Statement of the Case

The nature of the case and the proceedings below

This is a libel suit brought by plaintiff in the federal court on the basis of diverse citizenship (1).

On March 15, 1973, Doubleday & Company, Inc. ("Doubleday") published and began distribution of a book entitled My Life in the Mafia, authored by Vincent Teresa ("Teresa") with the "assistance" of Thomas C. Renner ("Renner"). Fawcett Publications, Inc. ("Fawcett") published a serialization of parts of this opus in the March and April 1973 editions of its magazine, True Magazine (29, p. 2).

*Naked numbers in parentheses refer to the numbered documents in the record on appeal; pages of those documents will be cited by use of the abbreviation "p." and paragraphs by use of the symbol "¶".

The book purports to relate Teresa's criminal activity as "the third leading money maker" in the New England Mafia (29, Teresa aff.¶3). Among the people described by Teresa as his colleagues in crime was plaintiff, to whom Teresa attributed numerous criminal acts and a place in the Mafia (ibid.).

Plaintiff has been and is in a federal prison, serving a 21-year sentence resulting from convictions in three cases (12). While in jail he borrowed a copy of My Life in the Mafia and discovered what had been written about him by Teresa and Renner (12).

On April 9, 1973, plaintiff filed a pro se four-count complaint against Doubleday, Renner, Teresa and Fawcett in the United States District Court for the Southern District of New York (1).

The first count alleges that 15 groups of statements ("the offending passages") appearing in My Life in the Mafia are "false and libelous statements and accusations (1, ¶5)." Doubleday is the defendant named as "publishing and distributing" the book and appears to be the sole target of this first count, which asks for $4,000,000 in compensatory damages (1).

The second count is directed at Renner as a co-author of the book and thus of the offending passages. The third count is aimed at Fawcett for having published all or parts of the offending passages. Again, the claim in each count is for $4,000,000 of compensatory damages (1).

The fourth count is pleaded against Teresa (1). Plaintiff charges that Teresa furnished Renner with the material for all 15 offending passages and that Teresa knew that the offending passages were false and that they were made "wantonly, maliciously and recklessly *** (1, ¶27)." Plaintiff also here tells of Teresa's "petty" criminal background and recites five further false defamatory accusations made by Teresa, this time to "Senate Investigators." He asks for both compensatory and punitive damages of $4,000,000 from Teresa (1).

Doubleday, Teresa and Fawcett promptly answered, setting up truth and First Amendment "public interest" defenses (2, 7). Several sets of interrogatories were propounded by plaintiff, Doubleday, Teresa and Fawcett (6, 14, 17, 18, 24, 25, 27), most of which were answered (12, 21, 22, 23, 26). Three sets of interrogatories were directed at Renner (15, 31, 32), but he never answered them; indeed, he never filed an answer to the complaint, contending that

he had never been served (28, p. 2). No depositions were taken; no documentary discovery was had.

In late September, 1973, all defendants -- including Renner -- moved for summary judgment on their papers and "the pleadings herein and upon all prior papers and proceedings (28)." They claimed the right to judgment on three "grounds":

(i) the publications "are of legitimate public interest;"

(ii) the publications could not have been made by defendants with "actual malice;" and

(iii) the complaint would have to be dismissed because there could be no monetary damages since plaintiff is a criminal who is presently incarcerated in the federal penitentiary at Lewisberg, Pennsylvania.

The motion papers of defendants consisted of an affidavit of their attorney (28), affidavits of Doubleday and Fawcett employees, as well as of Renner, and of three past or present Justice Department officials, and exhibits that included a transcript of plaintiff's criminal record (29). Also submitted was an "affidavit" of Teresa, which he had signed but hadn't sworn to (29). This document was accompanied by an affidavit of an attorney, who said that Teresa had signed it and stated that "he believes the same to be

true (29)." The attorney admitted that he had had no direct contact with Teresa and had reached him through intermediary sources (29).

Plaintiff did not submit any opposition papers.

The Decision of the District Court

The District Court granted summary judgment on the "public interest" rationale proposed by defendants and thus used a simple two-step route to its decision (36, 28). First, the Court said: "There can be no question that the subject of the book is one of great public interest (36, p. 3)." Second, it concluded: "Since My Life in the Mafia, and specifically, the statements about which plaintiff complains, were made to the public generally, and concern topics of legitimate public interest, it remains only to be shown that these statements were not published by the defendants with actual malice. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Kent v. City of Buffalo, 29 N.Y.2d 818 (1971) (36, p. 4)."

The District Court defined "actual malice" in terms of the majority opinion in New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964): that [illegible] knowledge that the statements involved were false or made with reckless disregard of whether or not they were false (36, p. 5).

The definition of malice was further narrowed for all defendants -- including the two authors -- by the District Court, which said: "Unless defendants entertained 'serious doubts' about the truth of the publications regarding plaintiff, they are not guilty of 'actual malice.' St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (ibid.)."

The District Court then went on to describe evidence that it said supported the conclusion that Doubleday, Fawcett and Renner had entertained no such "serious doubts" and granted all defendants the relief they sought (36, pp. 6-8). At no point did the court give a rationale for dismissal as against Teresa.

The Facts

The underlying facts about the 15 offending passages are hotly disputed. Plaintiff, in sworn answers to interrogatories, claims that they are false (12, ¶17). Teresa claims in his peculiar kind of affidavit that "each of these statements is absolutely true *** (23, Teresa aff. pp 2-3)."

Teresa's criminal record is a lengthy one; and he apparently makes his living by telling tales about the Mafia and testifying against alleged fellow criminals (ibid.). Teresa says he was led into becoming

a professional anti-Mafia witness for the government when nameless cohorts in crime failed to take care of his family while he was "in jail" and "stole for themselves large sums due [him] (ibid.)." Teresa is a self-confessed perjurer (22, p. 7). Teresa and the other defendants do take pride in the fact that Teresa has testified in cases where 45 convictions were had of some 25 "individuals" and would have us conclude therefrom that he is a truthful person (5, 29). Because of the lack of details we could more readily conclude that we don't know enough about Teresa's testimony in the cases to say anything positive about his truthfulness. And we could conclude just as easily that Teresa is a most "susceptible" witness.

The fifteen offending passages in My Life in the Mafia are quite detailed in their description of plaintiff's supposed criminal activity and his associates (1, ¶5). For examples: Plaintiff is pictured as being an accomplice of a man named "Fat Mike" in hijacking a trailer truck believed to contain liquor. Plaintiff is said to have purloined an entire bedroom set from the display window of White's Department Store and to have stolen packages from Jordan Marsh Department Store in Boston, Massachusetts. Plaintiff supposedly fixed the Constitution Handicap, a horse race run at Suffolk Downs Racetrack, Revere, Massachusetts, and on one occasion he supposedly went to a warehouse (with Teresa) in Everett, Massachusetts, memorized the number on the padlock,

had keys made and then stole millions of dollars worth of toys.

This Mafia book, thus, does not want for details; and in answers to interrogatories, plaintiff specifies how the offending passages of the Renner - Teresa collaboration are false (12, ¶17).

It is the motion papers for summary judgment that give us pause. For we have to struggle to dig out any description of the claimed substantiation and the substantiation procedures. At the bottom of every dig, we turn up generalizations; no serious attempt was made in any of the affidavits to match up testimonial and documentary evidence with the very specific accusations of the 15 offending passages. And the very sets of interrogatories that would have forced the disclosure of the confirming evidence behind the offending passages -- those sets addressed to Renner -- went unanswered as defendants pre-emptively moved for judgment (15, 31, 32).*

The Teresa "affidavit" addresses itself to the offending passages and proclaims:

---

* Plaintiff's first set of interrogatories (15, ¶¶ 10, 11, 13) demanded specifics as to Renner's verification of three of the fifteen offending passages (Complaint ¶5(g), (h) and (o)). Interrogatory 5 of plaintiff's second set of interrogatories (31) requested full specification of how Renner had verified "all the information in the book concerning, relating to, including, involving or referring" to the plaintiff.

> "**** each of these statements is absolutely true and Bobby [plaintiff] knows it. I personally witnessed most of the incidents *** and if I did not witness them I was personally told about them by Bobby himself (29, Teresa aff. ¶6)."

Teresa then suggests that his "answer to plaintiff's interrogatories" furnishes the specific details "about each such story (ibid.)." And, in answer to the third set of interrogatories, Teresa gives his version of some of "the stories" -- sometimes with details, sometimes without (23). In the final analysis, they remain "stories" -- incidents related by Teresa, which you're welcome to believe or not to believe.

What we would expect, however, is that Teresa will be bolstered by the investigations conducted by his "co-author" Renner, the professional writer and crime reporter (29). Indeed, Renner asserts in his affidavit that he made investigations to confirm what Teresa had told him about plaintiff. Renner tells us the 15 offending passages "can be generally categorized into *** three areas."

The first area of the 15 passages consists of "[c]rimes commited by plaintiff for which he was arrested and convicted (29, Renner aff. ¶ 4(i))." What Renner seems to be saying is that plaintiff's criminal record of convictions supports the 15 passages of the book. Renner says that the criminal record shows convictions for stock fraud,

bail-jumping and shoplifting. There is only one such record in the motion papers, the one attached to the affidavit of the attorney for defendants (28, Exh. C). We cannot find any conviction for shoplifting, and plaintiff, in sworn anwsers to interrogatories (12, ¶11(a)), has denied ever having been charged with such a crime. As for bail-jumping, it is not among the crimes described in the 15 offending passages. Unless we have misread the poorly photostated record, we can't see how the conviction for stock fraud shown there is tied to a specific offending passage in the Mafia book; and Renner doesn't help us. True, Renner says he "confirmed these facts with various federal prosecuters who were in charge of Teresa and/or plaintiff's prosecution." But what "facts"? The facts appearing on the criminal record, or the facts in the 15 offending passages? What are the names of these federal prosecutors? When was that confirming done? What did the confirmers say?

Renner's second "area" for the 15 offending passages is crimes supposedly "committed by plaintiff for which he was never convicted but for which there was available cross reference substantiation (29, Renner aff. p. 4(ii))." But only one "example" is used here by Renner.

Renner speaks, "for example," of horseracing "fixes" at Suffolk Downs (but not the Suburban Handicap). He says that "after being informed of this by Teresa, my investigation revealed that testimony was given to a Congressional Investigation Committee by one Joseph Barbozo that plaintiff was involved in numerous horse racing fixes *** (ibid.)." But who is one Joseph Barbozo? Apparently, he's another professional anti-mafioso (28, Exh. E). Renner next asserts that he was "advised that at certain times plaintiff was barred from the track by track officials." When? Where? And who are these officials?

In this second "area" Renner turns also to the allegation of "fraudulent credit card schemes" and turns on the flow of generalizations. Renner says that he "independently investigated organized crime infiltration into this area" and "various sources" informed him that plaintiff was involved in "schemes of this nature." He says that "in addition" he had "numerous FBI, Federal Strike Force and State Attorney General memoranda and reports which mention the plaintiff's name in discussing various criminal activities." We thought it not the policy of the FBI or the Department of Justice to divulge its files to reporters or bookwriters; therefore we remain highly skeptical of Renner's claim to

have seen "numerous" FBI and Federal Strike Force memoranda and reports. This kind of statement, of course, begs for cross-examination. It surely is not such stuff as summary judgments are ordinarily made of.

According to Renner the third "area" of the 15 offending passages is crimes that plaintiff committed with Teresa and "for which there was no available cross substantiation material." On this, Renner confesses he "particularly relied on the word of Teresa *** (29, Renner aff. p. 4(iii))." So be it.

Doubleday's case for summary judgment is chiefly supported by the affidavit of Thomas Congdon, a Senior Editor at Doubleday. It is, first, a paean to Renner's reputation and the proven reliability of Teresa (29, Congdon aff. ¶4). When it deals with Doubleday's major problem in this case -- proof of verification - it moves from one generalized statement to another (id. ¶6) and ends with rousing hyperbole (id. ¶¶ 7, 8).

Mr. Congdon admits that he was warned about possible libel and invasion of privacy by Doubleday's attorneys (id. ¶6) and particularly with respect to plaintiff (ibid.). Thus he was careful to check out what was written. According to Mr. Congdon, Renner met with attorneys for Doubleday and supplied "substantiation for the various questions that

had been raised by Doubleday's attorneys, including those raised in relation to the plaintiff (ibid.)." He says that "this substantiation consisted of such materials as criminal records, indictment records, conviction records and various other documents including FBI and Federal and state prosecutors reports (ibid.)." In addition, Renner "exhibited his personal file on various figures who are members of organized crime *** (ibid.)."

Mr. Congdon does confess: "In regard to the specific statements about which the plaintiff complains, for a few of these there was obviously no other substantiation available than Teresa's word *** (ibid.)." Mr. Congdon can't mean that there was no substantiation other than the word of Teresa; he can only mean that there was no substantiation of Teresa's word. All we have here is that word.

As if apologizing for this admission, Mr. Congdon in the next paragraph (id. ¶7) resorts to generalized hearsay from Renner about reports of "top officials" and "prosecuting authorities." Supposedly:

> "To a man, these [nameless] individuals reported to Renner that the book wa extremely accurate ***."

"To a man" -- obviously -- Mr. Congdon never actually spoke to "top officials" about this book or about plaintiff.

Mr. Congdon concludes:

> "I made every effort humanly possible before this book was published to insure that it contained only true and accurate statements."

But what has not been "humanly possible" for the moving parties here was to give us a single date, a single name of a "top official," a single title of a single FBI report, etc., to support the 15 offending passages of Doubleday's Mafia exposé.

Fawcett, according to the affidavit of William Iverson, a Senior Associate Editor, relied upon the reputation and the reports of Doubleday about Teresa and Renner and made no attempt of its own to substantiate the truth of those parts of the book that it published (29). It did, however, consult its attorneys (29).

ARGUMENT

THE DISTRICT COURT USED A TEST FOR LIABILITY THAT WAS SUBSEQUENTLY REJECTED BY THE SUPREME COURT IN GERTZ v. WELCH; THIS CASE SHOULD BE REMANDED FOR A DETERMINATION ON THE BASIS OF THE GERTZ TEST BECAUSE IT IS MORE FAVORABLE TO PLAINTIFF.

The District Court's opinion -- written in November of 1973 -- was based on a test for liability used by the plurality opinion of Justice Brennan in Rosenbloom v. Metromedia, Inc., supra, a greatly fractionalized decision of the Supreme Court. Based on that plurality view, the District Court resolved the competing values of free speech and the right not to be humiliated and injured by false defamation in this way:

(i) if the material published to a general audience is of "general or public interest," then

(ii) a plaintiff cannot recover for a libel unless he proves actual malice, defined in line with New York Times v. Sullivan, 376 U.S. 250 (1964), as knowledge of the libel's falsehood or reckless disregard of whether the libel was false.

But on June 25, 1974, the Supreme Court of the United States handed down its decision in Gertz v. Welch, supra. The majority opinion, written by Justice Powell, rejected that simple two-step test of the Rosenbloom plurality and

instead gave greater leeway to plaintiffs (41 L. Ed.2d at 807-10):

> (1) It does not matter whether the issue involved in the publication was one of "general or public interest."
>
> (2) The determination to be made is, first, whether the plaintiff is a "public official" (as in Times v. Sullivan) or a "public figure" (as in, for example, Curtis Publishing Co. v. Butts, 388 U.S. 130 (1969)).
>
> (3) If plaintiff is a "private person" then the common law is free to grant recovery on any basis other than one of absolute liability.
>
> (4) If plaintiff is deemed a public official or figure, then the Times v. Sullivan malice rule is to be applied.

Justice Powell's opinion was unequivocal in stating that the "public interest" test, used here in the court below, did not serve the competing values of furthering a robust press and protecting private persons from defamatory falsehoods. Justice Powell wrote (41 L.Ed.2d at 809):

> "The 'public or general interest' test for determining the applicability of the New York Times standard to private defamation actions inadequately serves both the competing values at stake."

Under the usual practice, then, this case should be remanded for a re-determination by the District Court under the proper standards. See, e.g., Jefferies v. Sugarman, 481 F.2d 414, 417 (2d Cir. 1973). There are substantial questions of law and fact that are best resolved in the District Court. Moreover, it is clear that at least one further "proceeding" should be had before there can possibly be a second determination of defendants' motion: the answering by Renner of plaintiff's interrogatories to place in the record something meaningful and exact about the verification of the offending passages in My Life with the Mafia.

For the benefit of the Court, we list the open questions, which must now be resolved in the court below, and then indicate the arguments that make summary judgment unlikely -- indeed, that preclude it on the present papers.

> First, the District Court will have to determine whether plaintiff is a "public figure" (he is surely not a public officer).
>
> Second, if he is not a public figure, the District Court must determine whether under a negligence test there are issues of fact or further proceedings that should be had that preclude summary judgment.
>
> Third, if plaintiff is to be regarded as a public figure, the District Court must determine whether under a malice test there are issues of fact or proceedings to be had that preclude summary judgment.

The public figure problem

On the issue of whether plaintiff is a public figure there is surely much to be said that he is not.

Justice Powell dealt with the issue in Gertz, noting the two ways that a plaintiff can become a public figure -- either by being very famous in general because of achievement (say, an Einstein or a Mark Spitz) or by voluntarily injecting himself into a public debate over a controversial issue (say, a Betty Freidan or the head of the New York City Policemen's Benevolent Association). Justice Powell said (41 L. Ed. 2d at 812):

> "In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is thrown into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions."

Obviously, plaintiff is not of the first category of men of "pervasive fame or notoriety." His name is hardly a household word. Nor does he fit into the second category of public figures. He hasn't "voluntarily" injected himself into a public controversy; nor -- save for this book -- has he been drawn into any public controversy. And if there is one thing clear in the cases, it is that

the offending publication cannot bootstrap itself into safety by making the plaintiff a public figure. See Rosenblatt v. Baer, 383 U.S. 75, 86-87 (1966); Gertz v. Welch, supra.

The facts and holding in Gertz, moreover, presage a finding that plaintiff in this case is a "private person." The plaintiff in Gertz was a lawyer who had represented, in a civil case, the family of a young man killed by a Chicago policeman. Defendant published a monthly outlet for the views of the John Birch Society and accused plaintiff of advocating the violent seizure of our Government and labeled him, among other things, a communist fronter. Plaintiff Gertz did appear at the coroner's inquest, and for years had been very active in civic and professional affairs in the Chicago area. Moreover, the civil trial did receive considerable attention in the press. Justice Powell found, nonetheless, that Gertz was not a public figure. He said (41 L.Ed.2d at 812):

> "In this context it is plain that [Gertz] was not a public figure. He played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of [the] Officer .... Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself in the vortex of this public issue nor did he engage the public's attention in an attempt to influence the outcome."

The only issue is whether plaintiff's criminal convictions make him fair game for Teresa and Renner. We submit not. We think it bad public policy that would so taint persons convicted of a that crime they become per se "public figures" when they truly are not. Such a rule would not promote rehabilitation and would be inconsistent with the concept of a man paying his debt to society.

We found only one case in New York State -- the substantive law of which guides this diversity case -- that bears on this issue. It is the lower court case of Jones v. Gates - Chili News, Inc., 78 Misc.2d 837 (Sup. Ct. Monroe Co. 1974). There the court found that a young defendant in a criminal case had become a public figure because he had in fact thrown himself into the events that led to the alleged libel by committing a crime that was reported in a local publication.

Even if we were to assume that this Jones case reflects both state and federal law, there is a large difference here: plaintiff denies the libel; there are issues of fact as to whether plaintiff did what My Life in the Mafia says he did.

It is significant that in Rosenbloon v. Metromedia, Inc., supra, nobody suggested that plaintiff was in fact a public figure even though he was arrested as a

peddler of alleged pornography. See, particularly, 403 U.S. at 31-36, 43.

Accordingly, (i) there is a serious legal issue to be resolved by the District Court as to whether plaintiff is a public figure and (ii), at best for defendants, that legal issue raises questions of fact that cannot be resolved on the present papers.

The question of negligence

If plaintiff is to be regarded as a private person, then the issue of liability will hinge on some concept of negligence; that is, on a basis "other than that of strict liability," which was the law of New York State prior to Gertz. See Drotzmanns, Inc. v. McGraw-Hill, Inc., 500 F.2d 830 (8th Cir. 1974).*

On this record -- if negligence be the test -- there is no way the two authors can escape by the route of summary judgment. There is an issue of fact whether

* There is no question, of course, that the accusation of a crime will remain, as it has been, defamatory per se. See Grinaldo v. Muesburger, 34 App.Div. 2d 586 (3d Dep't), appeal dismissed, 27 N.Y.2d 598 (1970).

Teresa's statements were untrue; and if they were, it would be difficult not to conclude that he was not merely negligent, but a most deliberate tort-feasor. If Teresa lied in a grand fashion it is hard to conceive that Renner wasn't imprudent -- at the very least -- in accepting the word of this criminal and perjurer, who is now making his way spinning stories about the cosa nostra. Under a negligence test, a good faith belief in Teresa by Renner is not a defense; it's only the beginning of one. See St. Amant v. Thompson, supra, 390 U.S. at 732; Guam Federation of Teachers, A.F.T. v. Ysrael, 492 F.2d 438, 439 (9th Cir. 1974). And the generalizations of Renner about consulting nameless people and unexhibited reports suggest a lot less care here than he would have us believe.

With regard to Doubleday and Fawcett, their answers to the interrogatories and the affidavits of their agents in support of the motion for summary judgment hardly dispel all factual issues.

In fact, the lack of specificity raises more questions than are answered by the defendant's papers. Did Renner name names to Doubleday and did Doubleday name names to Fawcett? And if the publishers were content with vague "reports" of "top officials" and the like, does that satisfy a duty to use reasonable care? Don't gener-

alizations stir suspicions; and, if Renner only generalized, weren't Doubleday and Fawcett under a duty to make further inquiry?

In sum, without the details of the story of verification of the 15 offending passages, the questions of negligence that arise on this record cannot be answered.

The question of malice

Even if plaintiff were to be found a "public figure" by the District Court, we believe the court should not grant summary judgment to any defendant -- not on the present record. A finding of lack of malice should not be made, for there appear to be questions of fact in regard to (i) whether deliberate or reckless falsehoods were told by Teresa and Renner and (ii) whether reckless falsehoods were published by Doubleday and Fawcett.

As to Teresa, there is no way we can see that he can avoid a trial on the issue of malice. The catalogue of crimes he attributes to plaintiff in the 15 offending passages would be the product of utter callousness at best, if a substantial number of them were proved false. The catalogue is indeed a full one, and plaintiff is portrayed as an ugly kind of crook without a redeeming feature. Plaintiff, for his part, swears the 15 offending passages

are false, and for purposes of summary judgment all inferences from the record must be drawn in favor of the party opposing the motion. United States. v. Diebold, Inc., 369 U.S. 654, 655 (1962); Goldwater v. Ginzburg, 261 F.Supp. 784, 788 (S.D.N.Y. 1966), aff'd, 414 F.2d 324 (2d Cir. 1969), cert. denied, 396 U.S.1049, reh. denied, 397 U.S. 978 (1970). Furthermore, Teresa is a man who has tried and is trying to profit by his alleged connections with criminals, particularly with plaintiff, and at their expense. Moreover, Teresa tells us that the reason he has turned on his former colleagues in crime is that they failed to make payments to his family while he was in jail.

As for Renner, it is hard to see how he would not be, at least, reckless if the 15 passages proved false; these are stories told him by a convicted and self-portrayed "mobster" looking for clemency and money. And it does appear, on analysis, that there is very little substantiation for the stories.

We note that, in finding for Teresa and Renner, the District Court made an error of law by applying the St. Amant test for malice to the two authors. Both St. Amant and Gertz (in dictum) teach that there must be a "high degree of awareness * * * of probable falsity" to find a publisher or a person once-removed from the facts guilty of malice. That's because they ordinarily have to rely on what's told them. Obviously that test

is not meaningful to authors, at least authors of defamation in wholesale volume. As to such authors of such libel, they will either know the falsity of what they say or know that they haven't checked the facts.

Doubleday and Fawcett are on a different footing. They can take advantage of the St. Amant "high degree of awareness" rule. But we find it difficult to say: "The evidence in this case did not reveal that respondent[s] had cause for such an awareness." Gertz v. Welch, supra, 41 L.Ed. 2d at 801. There just isn't enough hard, graspable evidence offered by the two publishing houses in the affidavits. In fact, we learn from both publishers that the manuscript caused them to seek the advice of lawyers (28, Callagy aff. ¶9; Iverson aff. ¶7). What escapes us in the defendants' papers are the details of Renner's checking that would have eliminated their fears.

Finally, as to all these defendants on the malice issue, we believe that without Renner answering the questions about his substantiation in detail or giving a good excuse why he can't answer, there must be an abiding question of credibility that tempts one to think that these authors and publishers really didn't care too much what they published -- safe in the knowledge that accused Mafiosi and convicts don't ordinarily sue for libel.

Conclusion

This case should be remanded to the District Court for a redetermination of the motion for summary judgment and for further proceedings in view of the Supreme Court's decision in Gertz v. Welch; very substantial issues of law and fact appear in need of resolution before any or all defendants can secure dismissal of this case.

Respectfully submitted

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